

"To invoke the aid of s. 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any other of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed it is difficult, if not impossible, to procure direct evidence to prove the intention of an individual — in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case."

In view of the fact that there was evidence that the appellant and his colleagues had previously demanded money from the deceased and his father and there was therefore a probability that when the three persons went to see the deceased it was for the purpose of extorting, he should have pointed this fact to the jury and therefore the jury had to be satisfied beyond reasonable doubt that common intention to kill was present long before that time, or could it have arisen just before the gun shot fire. In our view there was also this probability that the deceased was killed because he strenuously refused to accede to the payment to the extortioners at that moment with the result that further arguments ensued and that therefore, the killing was not the original intention of the persons. In the circumstances of course, the necessary common intention could not have existed. We are not sure that if directed thus, the jury would have come to the same verdict.

In the circumstances, we altered the conviction to one under section 387 of the Penal Code and passed sentence as I have indicated at the beginning of this judgment.

Conviction and sentence altered.

Solicitors: *K. L. Devaser & Co.*

LEONG SOW LIN & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (MacIntyre J.) June 8, 1967]

[Ipoh — Criminal Appeal No. 37 of 1967]

Road Traffic — Private vehicle — Conveyance of passengers — Whether for hire or reward — Whether vehicle was used as a public service vehicle — Road Traffic Ordinance, 1958, ss. 74(2), 92(1) & 144(a).

The appellants were convicted on charges under sections 92(1) and 74(2) of the Road Traffic Ordinance. In convicting the appellants the learned magistrate held that on January 30, 1966 the 2nd appellant, with the permission of the 1st appellant, used the car in question as a public service vehicle for the conveyance of passengers for hire or reward. The facts were as follows: On the morning of January 30, 1966 the 2nd appellant parked the car at the Ipoh Aerodrome opposite the police barracks. He was asked by a police constable and his wife for assistance to take their sick child to see a doctor at Ipoh. He agreed and invited the couple to get into a car. Following the couple were two others

A whom the 2nd appellant saw coming out of the guard-room of the police camp whom he knew to be police constables. He asked them whether they were going to Ipoh. Both replied in the affirmative and got into the car. While proceeding to Ipoh the car was stopped by the police and the car and passengers were taken to the police station. At the trial the policeman and his wife who were said to be taking their child to a doctor were not called to give evidence, nor were they offered as witnesses to be called by the defence. The two constables who were called to give evidence said that when they got into the car they were under the impression that they were getting a free lift, although they would have paid a fare at the end of the journey if asked to do so.

C Held: all the circumstances of the case coupled with the 2nd appellant's evidence were of sufficient weight to rebut the presumption that the passengers were carried for hire or reward. The conviction and sentence should be set aside and the car released to the 1st appellant.

Cases referred to:—

(1) *Aitken v. Hamilton* [1964] Crim. L.R. 546.

(2) *Din v. Public Prosecutor* [1963] M.L.J. 37.

D MAGISTRATE'S CRIMINAL APPEAL.

Chin Fook Yen for the appellants.

Idris bin Yusoff (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

E MacIntyre J.: This is an appeal from conviction and sentence in Ipoh Traffic Summons Case Nos. 1661 and 1662 of 1966 by the appellants herein of offences punishable under sections 92(1) and 74(2) of the Road Traffic Ordinance.

F The 1st appellant is the wife of the 2nd appellant and is the registered owner of motor car No. AA 7668. In convicting the appellants the learned magistrate held that on 30th January 1966, the 2nd appellant used the said car as a public service vehicle for the conveyance of passengers for hire or reward with the permission of the 1st appellant. It was not in dispute that a policy of insurance had not been taken out to cover third party risks in respect of the user of the said car as a public service vehicle. However, the relevancy of the charge depended upon whether or not the car was used at the material time as a public service vehicle.

H For a fortnight about 2 months before the date of the commission of the alleged offence, the car was seen about twice a day, once in the morning and once in the afternoon carrying passengers along Brewster Road, Anderson Road or Hugh Low Street by two police constables, namely, P.W.3 and P.W.4. All the passengers alleged to have been carried were said to be Chinese but it was not stated in evidence whether the passengers carried on each occasion were the same or not. If the passengers carried on each occasion were the same, they might have been members of the appellants' family in which case there could have been no justification for any suspicion that they were being carried for hire or reward. In the circumstances, I do not think

that the evidence of P.W.3 and P.W.4 could be regarded as sufficient ground work for a prosecution under section 92(1) of the Road Traffic Ordinance. In any event the presumption that passengers were conveyed for hire or reward by virtue of the provisions of section 144(a) of the Road Traffic Ordinance would arise only in respect of offences which are the subject-matter of a prosecution under Part V of the said Ordinance.

The facts of the case are simple. On the morning of 30th January 1966 the 2nd appellant parked the car at the Ipoh Aerodrome opposite the police barracks. He was asked by a Malay who happened to be a police constable and his wife for assistance to take their sick child to see a doctor at Ipoh. He agreed and invited the couple to get into the car. They got in with the child and sat on the rear seat. Following the couple were two others whom the 2nd appellant saw coming out of the guard-room of the police camp and whom he knew were police constables. He asked them whether they intended to go to Ipoh Town. Both replied in the affirmative and got into the car and sat on the front seat. The car then proceeded to Ipoh, when it was stopped by the police at Chamberlain Road. The car and passengers were taken to the police station and charges as above stated were later preferred against the appellants, resulting in their trial and conviction.

According to the 2nd appellant he had parked his car at the aerodrome to await a friend visiting a tin mine who had asked to meet him there. He had waited there in vain for an hour and was about to return to Ipoh when he was asked for assistance by the Malay couple to convey their sick child to a doctor. The prosecution case was that the story of the 2nd appellant that he waited for a friend at the aerodrome could not be true, because the alleged friend was supposed to be at a tin mine which was located at a place which he had already passed before reaching the aerodrome. According to them his conduct was more consistent with that of a person who had gone to the aerodrome in order to look for passengers.

Whatever might have been the intention of the 2nd appellant, the question posed by the evidence is: Did he convey the police constables and the woman and child for hire or reward? There is no doubt a presumption under section 144(a) of the Ordinance that they were in fact carried for hire or reward but it is a rebuttable presumption. In my opinion, the evidence of the 2nd appellant that he did not convey the passengers for hire or reward is corroborated by the surrounding circumstances and the admitted facts of the case.

In the first place, for reasons best known only to the prosecution, the policeman and his wife who were said to be taking their child to a doctor were not called to give evidence; nor

A were they offered as witnesses to be called by the defence. The presumption provided by section 114 illustration (g) of the Evidence Ordinance is that these witnesses if called would have given evidence unfavourable to the prosecution.

B Secondly, the two police constables who were called to give evidence, said that when they got into the car they were under the impression that they were getting a free lift, although they would have paid a fare at the end of the journey if asked to do so. They further said that they gained that impression by the manner in which the 2nd appellant spoke and acted. There is no reason to doubt that that impression was not wellfounded, for the last person on earth to whom the driver of a pirate taxi would give a lift for hire or reward would be a policeman with whom he was not previously acquainted.

C Thirdly, since the presence of the police constables in the car at the material time was not in furtherance of a police trap, the court should be reluctant to believe, unless strongly suggested by the evidence, that the three custodians of the law were engaged in breaking the law which they had solemnly undertaken to uphold.

E Fourthly, the learned magistrate does not appear to have taken into consideration the probability that the policemen concerned were taking advantage of their official position to get a free lift.

F The learned deputy public prosecutor contended that the car must be deemed to have been used for the conveyance of passengers for reward or hire because one of the passengers had said in evidence that he would have paid a fare if he was asked for it, and the other had said that on reaching Ipoh he intended to make a payment. The test to be applied, according to him, in order to decide whether the vehicle was used for the conveyance of passengers for hire or reward is whether the passengers had the intention of making a payment. In support of this proposition he cited the case of *Aitken v. Hamilton* ⁽¹⁾ where a Scottish Court of Appeal held that the vehicle concerned in that case must be deemed to have been used as an express carriage for hire or reward since the individual passengers concerned intended to make payment. The fact there appears to be that at the commencement of the journey the driver had suggested that a fare of £1 should be paid. One passenger paid the amount immediately and another volunteered to pay it, while the rest of the passengers did not say anything but travelled in the vehicle. In those circumstances, it was held that as each passenger had intended to make a payment, the vehicle was used as an express carriage. But, in my humble opinion, that case is not an authority for the proposition that a vehicle may be

deemed to be used for hire or reward (except by virtue of the presumption under section 144(a) of the Road Traffic Ordinance) where it could be reasonably inferred from the evidence that the driver never intended to charge a fare. The correct test to be applied is not whether the passengers had the intention to pay but whether the driver had the intention to charge a fare. This is the principle enunciated in *Din v. Public Prosecutor* ⁽²⁾ where the headnote reads:—

"The test is whether the accused intended to accept from the passengers a payment which he expected to be tendered when he had given them the ride."

In the instant case, the two constables, according to their evidence, were given the impression at the commencement of the journey that they would be given a free lift. There is nothing in the evidence to suggest that subsequently they had any reason to change that impression. All the circumstances of the case coupled with the 2nd appellant's evidence are, in my opinion, of sufficient weight to rebut the presumption that the passengers were carried for hire or reward.

The conviction and sentence is hereby set aside and the appellants are acquitted. The order confiscating the car is also set aside and I order that the car be released to the 1st appellant.

Appeal allowed.

C.D. v. COMPTROLLER OF INCOME TAX

[A.C.J. (Gill J.) June 10, 1967]

[K.L. — Civil Appeal No. 30 of 1967]

Income tax — Trustee — Remuneration payable to, under a will — Whether subject to payment of income tax — Earned income — Profit from property — Income Tax Ordinance, 1947, s. 10(1).

The appellant was appointed as an executor and trustee of the estate of *ETS* decd. under a will. The direction under clause 4 of the will was as follows: "I direct that my trustees shall be entitled to receive a remuneration of 5% in respect of their time and trouble in acting as such trustees, such remuneration to be calculated on the gross amount of all assets received by them." Although the will provided for a lump sum as remuneration for the trustees, the appellant in fact took his remuneration from time to time over a period of years. In respect of the remuneration which he received for each year after the coming into force on August 1, 1948 of the Income Tax Ordinance, he was assessed for income tax. His appeal to the Board of Review against such assessment having been dismissed, he then appealed to the High Court.

Held: the payments to the appellant arose out of the performance of his duties as trustee and are earned income in the sense that they are the product of his employment as trustee. Alternatively, the remuneration which he received was profit from property in the sense of his right to a payment of money, and thus liable to income tax.

Cases referred to:—

(1) *Re Thorley* [1891] 2 Ch. 613.

(2) *Dale & Ors. v. Inland Revenue Commissioners* [1951] 2 All E.R. 517, 519.

- A (3) *Dale & Ors. v. Inland Revenue Commissioners* [1952] 2 All E.R. 89.
- (4) *Dale & Ors. v. Inland Revenue Commissioners* [1954] A.C. 11.
- (5) *Partridge v. Mallandaine* (1886), 18 Q.B.D. 276, 277 and 278.
- (6) *MacMillan v. Guest* [1942] A.C. 561, 566.

B CIVIL APPEAL.

M. Shankar and K. A. Menon for the appellant.

Cur. Adv. Vult.

Wan Hamzah bin Wan Mohamed Salleh (Federal Counsel) for the respondent.

- C Gill J.: The appellant in this case was appointed as an executor and trustee of the estate of *Eu Tong Sen* deceased by a will dated the 16th day of September, 1933. Clause 4 of the said will provided as follows:—

- D "I direct that my trustees shall be entitled to receive a remuneration of 5% in respect of their time and trouble in acting as such trustees, such remuneration to be calculated on the gross amount of all assets received by them."

- E The deceased died in 1941. Although the will provided for a lump sum as remuneration for the trustees, the appellant in fact took his remuneration from time to time over a period of years. In respect of the remuneration which he received for each year after the coming into force on 1st August, 1948 of the Income Tax Ordinance, 1947, he was assessed for income tax. He appealed against such assessment by the Comptroller of Income Tax to the Board of Review. The Board of Review dismissed his appeal. Against that dismissal of his appeal he has now appealed to this court.

- F The point to be decided in this appeal, as it was in the appeal before the Board of Review, is whether a remuneration payable to a trustee under a will is subject to payment of income tax. It is common ground that for such remuneration to be liable to payment of income tax it must come within the provision of section 10(1) of the Income Tax Ordinance, 1947, the relevant portion of which reads as follows:—

- H "Income tax shall, subject to the provisions of this Ordinance, be payable at the rate or rates specified hereinafter for each year of assessment upon the income of any person accruing in or derived from the States of Malaya or received in the States of Malaya from outside the States of Malaya in respect of —

x x x x x

(b) gains or profits from any employment;

x x x x x

- I (f) rents, royalties, premiums and any other profits arising from property."

In *Re Thorley* ⁽¹⁾ it was decided that a bequest to a trustee of so much a year on condition that he performed the duties of a trustee was a gift on a condition. In *Dale & Ors. v. Inland Revenue Commissioner*, ⁽²⁾ where the testator